Case No. 48299-1-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

In Re the Dependency of S.K.P.

APPELLANTS' NOTICE OF ERRATA

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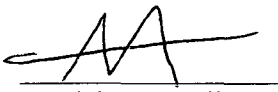
PLEASE TAKE NOTICE the Table of Authorities in Appellants' Opening Brief, filed on June 1, 2016, contains typographical errors. A copy of the corrected Table of Authorities is attached as Attachment A. The text of Appellants' brief is unchanged.

Appellants apologize for the errors in the Table of Authorities and any inconvenience this may have caused. For the convenience of the Court, opposing parties and their counsel, a substituted brief with the corrected Table of Authorities is also attached as Attachment B.

DATED this 10th day of June, 2016.



Candelaria Murillo, WSBA #36982
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Attachment A

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Attachment B

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I. INTRODUCTION

SKP, a nine year old child, requested an attorney during the ongoing dependency proceeding initiated by the state that dictated where she would be placed, in a home or more restrictive facility; whether she could see her half-siblings and contact her half-siblings' grandparents; where she could go to school; the course of her mental health treatment; and whether she would have to participate in visitation with her biological father who was a stranger to her. In Pierce County, where children are not automatically appointed counsel at any age, the court denied her request because SKP's case was not sufficiently "extreme" to justify appointment of counsel. Now this Court is presented with a question of first impression: do children in dependency proceedings have a categorical right to counsel under the state or federal constitution?

II. ASSIGNMENTS OF ERROR

The trial court erred in its failure to appoint counsel for SKP.

III. ISSUES PRETAINING TO ASSIGNMENTS OF ERROR

1. Does the due process clause of the Washington Constitution, which is protective of both physical liberty interests and fundamental liberty interests, confer a right to counsel on a child physically removed from her parents and placed into state custody as a foster child?

2. Does the Fourteenth Amendment require, or at least create the

rebuttable presumption of, appointment of counsel when the child experiences a loss of physical liberty when she is physically removed from her parents and placed into state custody as a foster child?

3. Should this Court formulate a blanket rule to appoint counsel in dependency proceedings given that a case-by-case approach is inconsistent, unworkable, and all children are similarly situated within the context of the proceeding?

IV. STATEMENT OF THE CASE

On November 19, 2014, Respondent Department of Social and Health Services (DSHS) brought SKP into state custody and filed a dependency petition. Clerks Papers (CP) 1-6. DSHS placed SKP into her maternal grandmother's home, separating SKP from her mother, her half-siblings and her half-siblings' grandparents with whom she had bonded. CP 42. Eight months into her dependency, SKP's mother, TC, was permitted by the court to move into the home; however, SKP remained separated from her half-siblings and their grandparents. CP 67-69, 94. SKP's move to her maternal grandmother's home forced SKP to change schools. *Id.* SKP was also ordered to engage with a mental health therapist and her private information was released to the state for all court ordered services. CP 27, 39, 68, 83, 187.

Among other life changing aspects of SKP's dependency was the

DSHS initiated search for SKP's father, JKP. CP 4. JKP had no relationship with SKP until DSHS found him. *Id.* TC alleged JKP had been abusive and that he tried to kill her when SKP was an infant so they separated. CP 30. SKP had not seen JKP since infancy. *Id.*

The intention of DSHS for managing SKP and JKP's relationship through court-ordered visitation changed during the dependency proceeding. Originally, DSHS said that visitation should start if (1) SKP was receptive to visitation and (2) visitation was therapeutically supported. CP 30. The court ordered visitation to start "as recommended by the child's therapist." CP 61. Both DSHS and the GAL observed that SKP was "reluctant" to visit with JKP and presented "elevated anxiety", "behavioral outbursts", and "additional anxiety" regarding her visits with him. CP 68, 83. Despite clear signals SKP was not receptive to visitation, and despite SKP's ongoing mental health therapy, neither DSHS nor the GAL consulted with her therapist about visitation. CP 67; CP 20, 83.[1] The GAL wrote in his report "[SKP] did not express any wishes" and recommended visits with JKP increase while visits with TC decrease. CP 84-86. The GAL even supported unsupervised overnight visits in JKP's home over SKP's increasingly vocal objections. CP 111. Later, the GAL submitted a declaration to the court stating that SKP's therapist refused to

[1] Notably, neither GAL report lists SKP's therapist as having ever been contacted. *Id.*

talk to him about the visitation issue. CP 143.

On Sept. 9, 2015, an attorney appeared on behalf of SKP for the limited purpose of moving for appointment of counsel. CP 115-139.[2] *Id.* SKP submitted a declaration to the court that although she had expressed her concerns to the other parties, no one was advocating for her position. CP 138. SKP revealed she felt powerless and voiceless, telling the court that an attorney "will help me...and help tell the judge what I want." *Id.*

DSHS opposed SKP's motion to appoint counsel. CP 199. Respondent Pierce County was allowed to intervene, arguing on behalf of the "Pierce County Court" that "[i]f an attorney is appointed, the funding for that attorney ultimately comes out of the budget of court, and there is not a budget for appointed attorneys in dependency matters." Report of Proceedings (RP) (Sept. 17, 2015), 9.

During oral arguments on SKP's motion for appointment, TC echoed SKP's sentiments. Report of Proceedings (RP) (Oct. 12, 2015), 22. TC's difficulty advocating for SKP was poignantly captured in this exchange between TC's attorney and the court:

> **MS. ZYDEK**: The problem, from our position, *is that mom is reluctant to advocate for a cessation of visits or somehow restricting visits because what she is then accused of is somehow coaching the child* to not want to see the father or coaching the child to say she doesn't like the visits and

[2] As discussed below, if SKP had lived in Benton/Franklin County, she would already have been appointed an attorney because she was eight at the time of her request.

> doesn't want to be at the visits.... To have an attorney as a neutral party who is only going to be advising the Court what her position is, what's going on in her life, what her parents are doing, what visits are like, we believe would be not only in [SKP]'s best interest but would present a clear kind of picture as to what's going on in this case, *and not place mom as a side issue in a position of having to advocate for her when it could come back and harm [mom]* in a way because of the accusations that have already so quickly been lodged...

RP 22-23(emphasis added).

The GAL again failed in his duty to protect the best interest of SKP when he took no position on SKP's expressed wish to have an attorney represent her. Even though the GAL spoke with SKP and understood she wanted an attorney, much like SKP's other concerns, he did not advocate for her stated interests. CP 142. No party to the dependency, including the GAL, advocated for SKP's stated or legal interests. SKP had no voice asserting her rights to increase sibling visits, stay in the same school, speed up the dependency, reduce her visits with JKP, or help her to articulate and advance her stated interests and goals. On Oct. 12, 2015, the court denied SKP's motion. CP 327-330.

V. SUMMARY OF THE ARGUMENT

One of the most traumatic events in the lives of children in foster care is removal from home. American Academy of Pediatrics Committee on Early Childhood, Adoption, and Dependent Care, *Developmental Issues*

for Young Children in Foster Care, 106 Pediatrics, 1145 (2000).[3] Experts agree that any amount time spent in foster care may be harmful to the child's growth, development, and well-being. *Id.* In one of the most awesome exercises of its power imaginable, the state physically removed SKP from her mother and placed her into state custody as a foster child.

Procedural due process can be broken down into three basic questions: (1) has there been a deprivation; (2) of life, liberty, or property; (3) without due process of law. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3rd ed. Aspen Publishers 2006), 548. Deprivation at its most common meaning is defined as "to take." *State v. Komok*, 113 Wn.2d 810, 815 n.4, 783 P.2d 1061 (1989). To restate these questions in the dependency context, this Court must decide whether our State can take a child, physically remove her from her parents and place her into state custody as a foster child, jeopardizing every liberty interest she has within an adversarial proceeding—without first providing the right to be represented by an attorney. Section A details the concrete liberty interests that children, and especially children like SKP have in dependency proceedings. Section B argues our State Constitution guarantees children's right to counsel in dependency proceedings. Section C argues if this Court instead applies the U.S. Constitution, then an independent analysis is

[3] *Available at*: http://pediatrics.aappublications.org/content/106/5/1145.full.

required that considers differences between dependency proceedings and termination of parental rights cases. Assuming the right to counsel attaches whenever physical liberty interests are implicated per *Lassiter v. Dep't of Soc. Servs. of Durham County, N.C.*, 452 U. S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), then this Court should find the U.S. Constitution guarantees children's right to counsel in dependency proceedings. If this Court finds children's physical liberty interests are not implicated in dependency proceedings, then this Court should apply *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) *contextually* rather than *individually* to find the U.S. Constitution guarantees children's right to counsel in dependency proceedings because a case-by-case approach is inconsistent, unworkable, and all children are similarly situated within the context of the proceeding.

VI. ARGUMENT

A. CHILDREN HAVE LIBERTY INTERESTS IN DEPENDENCY PROCEEDINGS

1. Children have unique liberty interests.

> *"Liberty" is a flexible term that denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be*

no doubt that the meaning of "liberty" must be broad indeed.[4]

To answer SKP's question about procedural due process in dependency proceedings, it may be necessary to define what is for SKP, and for all children in dependency proceedings, a "liberty interest." The U.S. Supreme Court has ruled the fundamental guarantees of due process apply to both adults and children in criminal and civil proceedings. *Schall v. Martin*, 467 U.S. 253, 263, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984)("There is no doubt that the Due Process Clause is applicable in juvenile proceedings."); *Parham v. J. R.,* 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) (questioning procedural due process in state law that allowed a parent to institutionalize a child for mental health reasons without a hearing); *In Re Gault*, 387 U.S. 1, 34, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (holding probation officer tasked with representing interests of children was not sufficient safeguard for due process in delinquency proceedings). For adults, liberty interests entail the freedom to marry, raise children, and engage in common acts of life. *Roth,* 408 U.S. at 571-72. For children, such essential liberties include freedom from bodily restraint and the freedom to be raised by their parents, have contact with family, attend school, receive adequate health care, and be protected from harm. Suparna

[4] *In re Dependency of J.H.,* 117 Wn.2d 460, 473, 815 P.2d 1380, 1386 (1991) (*citing Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042; *Board of Regents v. Roth,* 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)).

Malempati, *The Illusion of Due Process for Children in Dependency Proceedings*, 44 Cumb. L. Rev. 181, 198 (2014). It is well-established that children have liberty interests under both the federal and state constitutions and due process protections are required when those liberty interests are impaired. Specifically, children's liberty interests include:

Family Integrity. In Washington, children's liberty interests have been interpreted to include: "a constitutionally protected interest in whatever relationships comprise his or her family unit," and a "fundamental right to a stable family unit." *In re Custody of Shields*, 157 Wn.2d 126, 152, 136 P.3d 117 (2006) (Bridge, J., concurring); *State v. Rasch*, 24 Wash. 332, 335-36, 64 P. 531 (1901) ("[H]ome life is too sacred to be violated, even by the law, without most pressing cause... It is no slight thing to deprive ... a child of the protection, guidance, and affection of the parent."). The constitutional protection a child holds to stable and healthy family relationships includes a fundamental interest in maintaining and establishing familial bonds such as relationships with siblings. *State v. Santos*, 104 Wn.2d 142, 147, 702 P.2d 1179 (1985). Our courts have consistently placed special importance on the right to family integrity for children in foster care. *In re Dependency of T.R.,* 108 Wn. App. 149, 154, 29 P.3d 1275 (2001) (in termination following voluntary guardianship holding child has a right to freedom of choice in matters of family life as a

fundamental liberty interest protected by the Fourteenth Amendment and that when the rights of a child conflict with the same rights of the parent, the rights of the child must prevail).

Education. Children have a constitutional right to a basic education. *McCleary v. State*, 173 Wn. 2d 477, 269 P.3d 227 (2012). Children also have statutory and constitutional rights related to special education, including citizen complaints, facilitated IEP meetings, mediation, compensatory education, and due process hearings. Elizabeth Polay, *Raising the Floor: Advocating for Special Educational Services,* NWLawyer (November 2015).[5] Homeless students, which can include children in foster care awaiting placement or who were homeless prior to entering foster care, also have rights related to transportation and in-school supports. RCW 43.330.702.705. In Washington, children in foster care have the lowest graduation rates of any student group.[6]

Free Speech. Children also have constitutional rights relating to

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[5] Discussing *Forest Grove Sch. Dist. v. T.A.*, 555 U.S. 1130, 129 S. Ct. 987, 173 L. Ed. 2d 171 (2009), *Florence Cty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993), *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985), *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), and state and federal laws, *available at*: http://nwlawyer.wsba.org/nwlawyer/november_2015?pg=15#pg15

[6] *See* Office of the Superintendent of Public Instruction, *Graduation and Dropout Statistics Annual Report 2012-2013* at 3, *available at*: http://www.k12.wa.us/dataadmin/pubdocs/GradDropout/12-13/2012-13GraduationAndDropoutStatisticsAnnualReport.pdf (Noting that youth in foster care had a 4-year high school graduation rate of only 36.6%, the lowest of any group).

freedom of speech. *See, e.g., Herbert v. Wash. State Pub. Disclosure Comm'n*, 136 Wn. App. 249, 257, 148 P.3d 1102, 1106 (2006) ("The First Amendment's guarantee of free speech applies in schools...").

Privacy and Reproductive Health. Children have constitutional rights related to both privacy and reproductive health. *See, e.g., State v. Meneese*, 174 Wn.2d 937, 944, 282 P.3d 83 (2012) (holding school search exception to warrant requirement did not apply to school resource officer's search of juvenile's backpack); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302-303, 178 P.3d 995 (2008) (holding school's policy allowing for random and suspicionless drug testing violated privacy provisions of state constitution); *State v. Koome*, 84 Wn.2d 901, 904, 530 P.2d 260 (1975)(striking down statute requiring parental consent for abortion as unconstitutional under state and federal due process clauses and recognizing "the equal status of the rights of minors seems particularly necessary with regard to the privacy rights involved here.").

Safety. While all children have liberty interests in Washington, the courts have recognized that children have additional liberty interests in the dependency context. Safety is one such interest. As enumerated by our Supreme Court in *Braam v. State*, children have the right "to be free from unreasonable risks of harm and a right to reasonable safety." 150 Wn.2d 689, 698-700, 81 P.3d 851 (2003) ("[F]oster children possess substantive

due process rights that the State, in its exercise of executive authority, is bound to respect... [and at the] core of [substantive due process jurisprudence], foster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety."). *See also In re Dependency of A.C.*, 74 Wn. App. 271, 275, 873 P.2d 535 (1994) (holding children's health and safety must be the "paramount consideration.").

Religion and Culture. Children in foster care have recognized constitutional rights relating to religion and culture. *See, e.g.,* Const. art. I, § 11; RCW 13.34.070 (notices to Indian tribes regarding foster children).

Speedy Administration of Dependency Proceeding. Children also have liberty interest in the speedy resolution of their dependency proceeding. Const., art. I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."); RCW 13.34.020 (children possess the "rights of basic nurture, physical and mental health, and safety", which includes "the right to a safe, stable, and permanent home and a speedy resolution of any [dependency] proceeding.").

In sum, SKP, like all children, has a "liberty interest" in family integrity, access to education, freedom of speech, privacy, and her own healthcare. In the traumatic circumstances surrounding physical removal from her mother and placement into state custody as a foster child, SKP,

like all children in dependency proceedings, has additional liberty interests such as her rights to family integrity being weighed as paramount, safety, continuity of education, freedom of religion and culture, and to permanency decisions being made quickly.

2. Because children have numerous liberty interests in the dependency context, these children are entitled to procedural due process in dependency proceedings.

The fundamental nature of children's liberty interests at stake in a dependency proceeding gives rise to the need for constitutionally adequate procedures, including appointment of counsel. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) ("[T]he Due Process Clause provides that certain substantive rights--life, liberty, and property--cannot be deprived except pursuant to constitutionally adequate procedures."); *Mark G. v. Sabol,* 717 N.E.2d 1067, 1073, 93 N.Y.2d 710 (1999) ("Procedural due process differs from substantive due process by focusing not on what a person has been deprived of, but rather on how the deprivation was accomplished."). Children in foster care "suffer a fundamental lack of fairness in a system that takes over their lives, but denies them any way to enforce rights afforded to them." Bobbe J. Bridge & Joel Benoliel, Opinion, *State should provide attorneys for foster children,* Seattle Times, Feb. 5, 2013.[7] When

[7] *Available at*: http://old.seattletimes.com/text/2020288374.html

denied appointment of counsel, children in dependency proceedings are deprived of their right to procedural due process.

This Court by constitutional command bears the responsibility to measure the procedural due process necessary to protect children's liberty interests; once measured, the legislature must develop a scheme for implementation. *See, e.g., McCleary*, 173 Wn. 2d at 515 (judiciary has primary responsibility for interpreting constitution); *In re Gault*, 387 U.S. at 72 ("Court may guarantee the fundamental fairness of the proceeding [and] permit the State to continue development of an effective response..."); *Cleveland Bd*, 470 U.S. at 541 (holding the procedures required by due process is a constitutional question to be answered by the judiciary, not a statutory question for the legislature).

B. THE WASHINGTON CONSTITUTION GUARANTEES CHILDREN'S RIGHT TO COUNSEL IN DEPENDENCY PROCEEDINGS

1. The State Constitution controls this case.

"No person shall be deprived of life, liberty, or property, without due process of law." Const., art. I, § 3. No Washington court has addressed whether this provision affords children the right to be represented by an attorney in the dependency context. However, this provision has already been interpreted to confer the right to counsel on parents in dependency proceedings, demonstrating that our procedural due process doctrine is

distinct from the federal.

This Court need not apply the analysis laid out in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), which is reserved for situations where there is already federal jurisprudence on point forcing the question of whether the Washington courts should take an independent path. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641, 211 P.3d 406, 410 (2009) ("*Gunwall* articulates standards to determine when and how Washington's constitution provides different protection of rights than the United States Constitution."); *State v. Foster*, 135 Wn.2d 441, 455, 957 P.2d 712 (1998) (state constitutional analysis only begins with federal law to determine whether state clause provides greater protection); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 644, 771 P.2d 711 (1989), *amended*, 780 P.2d 260 (1989) ("Therefore, the relevant analysis must follow state doctrine; our result is based entirely on adequate and independent state grounds."); *Gunwall,* 106 Wn.2d at 62-63. The U.S. Supreme Court has considered parents' rights in terminations, but never children's rights to counsel within the *dependency* context. *Lassiter,* 452 U. S. at 43 n.10 (Blackmun, J. dissenting)("The possibility of providing counsel for the child at the termination proceeding has not been raised by the parties. That prospect requires consideration of interests different from those presented here, and again might yield a different result with respect

to the right to counsel."). This Court should look directly to our State Constitution to determine if it provides SKP's requested relief: the right to be represented by an attorney.

2. The Washington Constitution already confers the right to counsel on parents in dependency proceedings.

For over 40 years, Washington courts have stated that parents have a right to counsel in dependency proceedings. The right was first articulated in *In re the Welfare of Luscier* when our Supreme Court held that both state and federal due process required appointment of counsel for parents in termination of parental rights cases. 84 Wn.2d 135, 138, 524 P. 2d 906 (1974)("[T]he parent's right to counsel in this matter is mandated by the constitutional guarantees of due process...".); *In re the Welfare of Myricks*, 85 Wn.2d 252, 254- 55, 533 P. 2d 841 (1975) (clarifying parents hold the same right in dependency proceedings).

In *Lassiter*, decided six years after *Luscier* and *Myricks*, the U.S. Supreme Court held that parents facing termination of their parental rights do not have a categorical right to counsel under the Fourteenth Amendment. 452 U. S. at 32-34. In so holding, the U.S. Supreme Court overruled only the federal constitutional component in *Luscier*. *Bellevue Sch. Dist. v. E.S.,* 171 Wn.2d 695, 712, 257 P.3d 570 (2011) ("The federal constitutional underpinnings of *Luscier* were...abrogated by the U.S.

Supreme Court in *Lassiter*..."). The U.S. Supreme Court did not consider parent's rights in dependency proceedings; therefore, it cannot be argued that *Lassiter* directly or indirectly overruled *Myricks.*[8]

Only two years post-*Lassiter*, our Supreme Court stated that "the right involved in the present case is the right to counsel in child deprivation proceedings which, except in limited circumstances, *finds its basis solely in state law.*" *In Re Hall*, 99 Wn.2d 842, 846, 664 P.2d 1245 (1983) (emphasis added). In *Hall,* our Supreme Court held that parents appealing a termination require greater protection than *criminal* appellants. Specifically, a parent's attorney could not seek to withdraw under the procedure in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967) because while a criminal defendant must be at least competent to stand trial and therefore have some ability to appear pro se, "the respondent in a child deprivation proceeding may be entirely incompetent and entirely unable to raise potentially meritorious issues..." *Hall,* 99 Wn.2d at 847. Unlike in *Lassiter,* our Supreme Court found a categorical right. While primarily concerned with incompetent parents, our Supreme Court reasoned "case-by-case competency hearings would be too cumbersome a process and find a blanket prohibition on withdrawal [of counsel] the preferable approach. While this may require counsel to argue

[8] As discussed in Section C(1)(b)-(c) below, dependencies are distinct from terminations.

some frivolous appeals, we believe this is a small price to pay for assuring that the rights of all parents are fully protected." *Id.*

Again notwithstanding *Lassiter,* our Supreme Court became the first state in the nation to recognize a right to counsel for parents in a discretionary appeal arising from a dependency finding. *In re Dependency of Grove,* 127 Wn.2d 221, 237 897 P. 2d 1252 (1995).[9] In *Grove*, our Supreme Court compared the right to counsel in a worker's compensation appeal with a parent's right to counsel, the latter involving "a fundamental liberty interest." *Id.* at 237-38 (quoting *Luscier* as holding "the right to one's children is a 'liberty' interest protected by the due process clauses of the federal and state constitutions").

More recently, in *King v. King* our Supreme Court reaffirmed the right to counsel extends to cases in which "a fundamental liberty interest ... is at risk" and used parent's right to counsel in appellate proceedings as an example. 162 Wn.2d 378, 395, 174 P.3d 659 (2007) (quoting *Grove*, 127 Wn.2d at 237). The Court observed "[w]hile the federal due process underpinnings of these decisions may have been eroded [by *Lassiter*]...We note that *Lusicer* and *Myricks* were cited more recently in our case, *In re Dependency of Grove*," suggesting their continuing vitality. *Id.* at 384 n.3. Chief Justice Madsen confirmed: "No Washington case has

[9] It appears the only other state to go so far is Texas: *Interest of P.M.*, 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016).

ever held that *Luscier* or *Myricks* was wrongly decided or is no longer valid." 162 Wn.2d at 414 (Madsen, J. dissenting); *see also In re Custody of B.M.H.*, 179 Wn.2d 224, 259, 315 P.3d 470 (2013) (Madsen, C.J., dissenting) (describing the courts continued protection for the "fundamental liberty interest that parents have in the care and welfare of their minor children." (citations omitted)).

Our Washington appellate courts also continue to recognize parents' right to counsel with some courts independently exploring and declaring the continuing vitality of *Luscier, Myricks,* and *Grove.* In *Dependency of G.G.*, the appellate court held a parent's right to counsel in termination trials is "a right derived from the due process guarantees of article I, section 3 of the Washington Constitution and the Fourteenth Amendment." 185 Wn. App. 813, 826, 344 P.3d 234 (2015), *review denied*, 184 Wn.2d 1009 (2015). The court stated that "*Lassiter* does not diminish the vitality of the due process based right to counsel in termination proceedings." *Id.*, n18. *See also In re Dependency of A.M.M.*, 182 Wn. App. 776, 791, 332 P.3d 500 (2014) ("Accordingly, parental termination proceedings are accorded strict due process protections." (*citing In Interest of Darrow,* 32 Wn. App. 803, 649 P.2d 858 (1982))); *In re Dependency of H.,* 71 Wn. App. 524, 530-31, 859 P.2d 1258 (1993) ("We note that the court must take great care in safeguarding a parent's

due process rights by allowing witnesses to be examined.").

In *re Welfare of G.E.*, this very Court observed the Alaska Supreme Court, interpreting an identical due process clause, held its state constitution provided a right to effective counsel in termination proceedings. 116 Wn. App. 326, 332, 65 P.3d 1219 (2003) (citing *V.F. v. State*, 666 P.2d 42, 45 (Alaska, 1983) ("no person shall be deprived of life, liberty, or property, without due process of law")).[10]

Ultimately, the jurisprudence developed by our appellate courts over four decades remains good law. And, given that a child has *even more liberty interests at stake* than her parent in a dependency proceeding; children must have a constitutional right to counsel.

3. Even if this Court adopts a *State v. Gunwall* analysis, *Gunwall* compels the conclusion that children are entitled to counsel under the State Constitution.

Because the extent of protection for children's right to counsel in dependency proceedings under the Fourteenth Amendment is unknown, SKP is not required to – and need not – conduct the *Gunwall* analysis to establish the state constitution provides *greater* protection for individual

[10] Indeed, Alaska has a whole line of cases protecting parent's right to counsel. *Matter of K.L.J.*, 813 P.2d 276, 286 (Alaska 1991); *V.F. v. State*, 666 P.2d 42 (Alaska 1983); *Flores v. Flores,* 598 P.2d 893 (Alaska 1979). *See also In re Doe*, 57 P.3d 447, 458, 99 Haw. 522, 533 (2002) ("Procedural due process requires that an individual whose rights are at stake understand the nature of the proceedings he or she faces."); *In re T.M.*, 319 P.3d 338, 354, 131 Haw. 419 (2014) (rejecting the case-by-case approach under *Lassiter* as too unpredictable and recognized a constitutional right to counsel for both abuse/neglect proceedings and termination of parental rights cases).

rights than does the U.S. Constitution. *Gunwall,* 106 Wn.2d at 59. Simply put, a *Gunwall* analysis is unnecessary here. If a *Gunwall* analysis is desired, however, the analysis shows that Const. art. I, § 3, guarantees children's right to counsel in dependency proceedings.

Differences in text. The language of art. I, § 3 is nearly identical to that of the Fifth and Fourteenth Amendments. Yet, even where state and federal constitutional provisions are identical, it is possible that the intent of the state framers differed from that of the federal framers nearly one hundred years earlier. *Gunwall,* 106 Wn.2d at 61; *State v. Jorgenson*, 179 Wn.2d 145, 153, 312 P.3d 960 (2013) (observing Washington Constitution is "patterned primarily on other state constitutions, which themselves draw from prerevolutionary common law."). Even though art. I, § 3 has identical language to its federal counterparts, it should be "interpreted independently unless historical evidence shows the framers intended otherwise." *State v. Ortiz*, 119 Wn.2d 294, 319, 831 P.2d 1060 (1992) (Johnson, J., dissenting) (citing Robert Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L.Rev. 491, 514–16 (1984)). As there is no determinative historical evidence on the framer's intent on this point, the second *Gunwall* factor favors independent analysis.

State constitution and common law history. Unlike the federal

convention where delegates feared populism, the delegates at the 1889 Constitutional Convention feared the exact opposite: governmental tyranny that "they generally identified with the legislative branch." Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 671 (1992); *see also* Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington's Law of Law-Making*, 39 Gonz. L. Rev. 447, 449 (2004) (framers were suspicious toward the legislature and adopted a very broad declaration of rights, many of which are not limited exclusively to infringement by the government). Our State Constitution was intended to broadly protect individual rights with the federal constitution kept as "a secondary layer of protection." *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring); *see also* art. I, § 1 (government powers "are established to protect and maintain individual rights"). Because protecting individual rights lies at the heart of our State Constitution, art. I, § 3 requires independent interpretation unless historical evidence shows otherwise. *See* Snure, *supra*, at 675, 682-83 (explaining unique connection of fundamental principles with individual rights); James W. Talbot, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 Wash. L. Rev. 1099, 1100 (1991) (noting constitutional distinctions reveal the state

provides greater protection for civil liberties).

Historical evidence shows our State Constitution is more protective of children because in *contrast with the federal*, our State Constitute twice references the care of children. Article IX, section 1 provides that it is the "paramount duty of the state to make ample provision for the education of all children residing within its borders. . . ". Article XIII, section 1 requires the state to foster and support institutions for the benefit of youth with physical or developmental disabilities or mental illness and "other such institutions as the public good may require."[11] These state provisions indicate that *historically* our State Constitution has exceeded the federal constitution in its protection of children's welfare.

This Court must measure the procedural due process necessary to protect children's liberty interests, including the most sacred of any individual right, family integrity, which carries the highest constitutional weight. *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) ("The family entity is the core element upon which modern civilization is founded. Traditionally, the integrity of the family unit has been zealously guarded by the courts. The safeguarding of familial bonds is an innate concomitant of the protective status accorded the family as a

[11] This provision could be read to include foster care.

societal institution."); Jennifer K. Pokempner, et al., *The Legal Significance of Adolescent Development on the Right to Counsel*, 47 Harv. C.R.-C.L.L. Rev. 529, 542 (2012). Our courts' longstanding tradition of protecting family integrity should extend to the dependency proceeding that literally dictates the child's family. Subject to the courts, DSHS says who can be included in the child's family by allowing or disallowing contact/visitation and by moving children from one family to the next or into more restrictive facilities. *See, e.g., Braam,* 150 Wn.2d 689 (state continues to be monitored under consent decree in lawsuit by foster children seeking to force DSHS to reduce the number of times foster children are moved by DSHS during care). Therefore, this third factor favors independent analysis.

Pre-existing state law. At the outset, it is important to note due process analyses are not intended to freeze the interpretation of constitutional principles. *Grant Cty. Fire Prot. Dist. v. City of Moses Lake No. 5,* 150 Wn.2d 791, 809, 83 P.2d 419 (2004). "Due process is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." *Griffin v. Illinois*, 351 U.S. 12, 20, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (opinion concurring in judgment). If due process notions did not evolve, children, and others, would retain their status as chattel. As our Supreme Court

observed over ten years ago, without counsel, children in dependency proceedings are given an inferior status wherein they are rendered *even more* "vulnerable ... powerless and voiceless." *In re Parentage of L.B.*, 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005).

Whether the state due process clause provides greater protection than the federal depends on context. *Bellevue Sch. Dist.*, 171 Wn.2d at 711 ("[C]ontext matters when we are determining whether to independently analyze the state due process clause."). In *Bartholomew*, our Supreme Court held it was not constrained by the U.S. Supreme Court's interpretation of the Eighth and Fourteenth Amendments in "the unique context of a capital sentencing procedure." 101 Wn.2d 631, 639, 683 P.2d 1079; *see also State v. Davis*, 38 Wn. App. 600, 605, 686 P.2d 1143 (1984) (rejecting U.S. Supreme Court precedent and holding use of juvenile's post-arrest silence violated state due process clause) (citations omitted); *cf. State v. Ortiz,* 119 Wn.2d at 304 (holding the state due process clause does not provide greater protection than the Fourteenth Amendment in duty to preserve potentially exculpatory evidence).[12] As discussed above, in the dependency context, Washington law demonstrates

[12] Unlike *Bartholomew, Ortiz* is a plurality decision. Four justices concluded that state and federal due process is coextensive. *Id.* at 304. The fifth justice concurred in the result, but decided that the issue of whether state and federal due process protections are identical need not be reached because the result was the same under *either* the federal or the state due process clauses. *Id.* at 315 (Dolliver, J. concurring).

deep concern with parent's rights and a consistent preference for blanket rules of access and appointment, rather than a cumbersome case-by-case approach.

Our Supreme Court in *Gunwall* also said state law "may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims." 106 Wn.2d at 62. Therefore, this fourth factor requires the Court to consider the degree of protection that Washington has historically given in similar contexts. *Id.* at 61-62. State law has undeniably been favorable to children's rights in the dependency context.

In discussing the family unit as a "fundamental resource of American life," RCW 13.34.020 dictates children's rights take precedence, and children's rights include basic rights to nurturing, to physical and mental health, to a safe, stable and permanent home, and to speedy resolution of the proceeding. *No analogous federal protection exists.*

Children also enjoy greater rights under Washington dependency law than federal law in other areas, such as RCW 13.34.215, which dictates children may petition for reinstatement of parental rights and be appointed counsel in that proceeding. Under RCW 13.34.100(7), youth of any age can ask for counsel, and youth over age 12 must be informed of their right to ask for counsel. RCW 13.34.100(6) requires counsel be appointed for certain legally free youth; RCW 13.34.267(6) requires counsel be

appointed for youth in extended foster care; JuCR 9.2(c) requires counsel if no GAL/CASA has been appointed; and GR 33 requires appointment of counsel for individuals with disabilities when appropriate. The legislature has also acknowledged the importance of children's right to counsel in other areas: Child in Need of Services, RCW 13.32A.150, and At-risk Youth proceedings, RCW 13.32A.190.

A long state history supports the principle that children's rights to well-being are paramount. *See, e.g.*, *Carey v. Hertel*, 37 Wash. 27, 30, 79 P. 482 (1905) ("The future welfare of the child is the paramount consideration…); *Rasch*, 24 Wash. at 335-36. For example, in *In re Harris,* our Supreme Court found that a summons procedure that allowed a county-designated mental health professional to authorize apprehension and detention of a young woman for involuntary civil commitment, based only on an affidavit submitted by the young woman's mother, substantially affected a private interest. 98 Wn.2d 276, 654 P.2d 109 (1982). Although the summons authorized detention for only seventy-two hours, the court found that confinement for a period of that length still constituted a "massive curtailment of liberty." *Id.* If a juvenile facing brief detention or even simple charges like littering on a bus (RCW 9.91.025) is afforded an attorney, how much *more serious* is the dependency proceeding that controls every aspect of their care and well-being for up to

21 years with almost no right to direct appellate review? Extensive state laws and court cases providing greater protection in dependencies dictate this fourth factor be resolved for independent analysis.

Differences in structure. The U.S. Constitution is a grant of limited power authorizing the federal government to exercise only those constitutionally enumerated powers delegated to it by the states, whereas our state constitution imposes limitations on the otherwise plenary power of the state. *Gunwall,* 106 Wn.2d at 66. This fact *always* supports interpreting state provisions as more protective under the fifth factor. *In re Custody of RRB*, 108 Wn. App. 602, 620, 31 P.3d 1212 (2001) ("[F]actor five will always support an independent state constitution analysis.").

Matters of particular state or local concern. Although there is federal involvement in child welfare systems, the civil proceedings in Washington juvenile courts are governed by state statute, not federal law. The *Lassiter* Court recognized minimum standards required under the Fourteenth Amendment do not prevent state adoption of higher standards:

> Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well...The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

452 U.S. at 34. Therefore, the sixth Gunwall factor is also interpreted for

independent analysis in matters of family integrity. *State v. Smith*, 117 Wn.2d 263, 286-87, 814 P.2d 652 (1991) (Utter, J. concurring); *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987) (issues of family relations are matters of state concern).

Other factors. The *Gunwall* criteria are deliberately "non-exclusive" to allow parties to make other arguments to support an independent analysis. *Gunwall*, 106 Wn.2d at 58. Another factor(s) to consider are trends among the states and international law. *See, e.g., State v. Yates*, 161 Wn.2d 714, 792, 168 P.3d 359 (2007) (including arguments on international treaty within *Gunwall* analysis). Since this Court is confronted with an issue of first impression, and notions of due process evolve, it is especially worth considering the larger trends. As the U.S. Supreme Court said in *Schall*:

> The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' In light of the uniform legislative judgment that pretrial detention of juveniles properly promotes the interests both of society and the juvenile, we conclude that the practice serves a legitimate regulatory purpose compatible with the "fundamental fairness" demanded by the Due Process Clause in juvenile proceedings.

467 U.S. at 268 (citations omitted). Thirty-two states and the District of Columbia provide an automatic right to legal representation for children in

dependency proceedings.[13] *See Kenny A. v. Perdue,* 356 F. Supp. 2d 1353, 1360-1361 (N.D) (declaring children's constitutional right to counsel under state constitution). The American Bar Association has also promulgated a "Model Act Governing Representation of Children in Abuse, Neglect, and, Dependency Proceedings," which recommends independent counsel to children in every child welfare case.[14] Last year, the Washington State Bar Association adopted a resolution to support the same.[15] All key stakeholders in Washington's dependency proceedings have determined the addition of counsel for children improves the ability of the court in reaching an accurate and just decision.[16]

C. FEDERAL CONSTITUTION GUARANTEES CHILDREN'S RIGHT TO COUNSEL IN DEPENDENCY PROCEEDINGS

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[13] Washington was one of only ten states to receive a failing grade on its record of protecting a child's right to counsel in dependency cases, and the state's score of fifty-three is the fourth worst in the nation. The Children's Advocacy Institute (CAI) and First Star, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* 123-24 (3d ed. 2012), *available at* http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf.

[14] American Bar Association, *ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings*, 5 (2011), *available at:* http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf

[15] WSBA minutes available at: http://www.wsba.org/~/media/Files/About%20WSBA/Governance/BOG%20Minutes/2014%202015/Public%20Session%20Minutes%20%20September%201718%202015%20FINAL.ashx

[16] Washington Administrative Office Of The Courts, *Meaningful Representation For Children And Youth In Washington's Child Welfare System* (2010), *available at* http://www.law.washington.edu/Directory/Docs/kelly/HB2735.pdf. ("All children subject to dependency or termination of parental rights court proceedings should have legal representation as long as the court jurisdiction continues."). The standards are endorsed by the Office of the Attorney General and DSHS.

1. SKP presents a question of first impression.

a) In Re Dependency of M.S.R. does not control this case.

Even if this Court reviews SKP's state constitutional claim and decides the right to counsel is not guaranteed under the Washington Constitution, the Court should still find there is a categorical right to counsel under the federal constitution. No guidance on children's right to counsel in *dependencies* exists under the federal constitution. SKP presents a question of first impression.

This Court does not have to follow *In re Dependency of M.S.R.,* 174 Wn.2d 1, 271 P. 3d 234 (2012), *as corrected* (May 8, 2012) (*"MSR")* in its application of *Mathews* in the dependency context—and has good reason not to. Our Supreme Court in *MSR* considered whether the trial court erred when it denied counsel to siblings during a termination of parental rights case. Refusing to consider the children's state constitutional claim (raised late and by their mother) the Court held under *Lassiter*, the *Mathews* factors may be applied by the trial court on a case-by-case basis to determine if due process is satisfied in any case. *Id.* at 21. The Court recognized the limited nature of its holding: "We recognize that this is an appeal of a termination order. Nothing in this opinion should be read to foreclose argument that a different analysis would be appropriate during the dependency [sic] stages." *Id.* at 22 n.13. In contrast to *MSR,* this case

squarely presents the question of whether children in dependency proceedings have a categorical right to counsel and requires a constitutional analysis that considers the traumatic experience of being physically removed from one's parents by the state and placed into state custody as a foster child from the child's perspective.

b) All parties have conceded dependency proceedings differ from terminations.

All parties have conceded dependency proceedings differ from termination of parental rights cases. Specifically, DSHS argued to our appellate courts in *MSR* that a dependency proceeding differs from a termination because a termination of parental rights case does not determine where a child will be *physically* placed:

> A proceeding to terminate parental rights does not determine other issues regarding the child's ongoing welfare, such as whether the child is returned to the parent's home or remains in out-of-home care. Such decisions are made in the separate dependency proceeding, which begins prior to the termination proceeding, continues after it, and encompasses all matters associated with the child's care and well-being during the dependency.

Supp. Response Brief of DSHS at 4-5, *In re Dependency of M.S.R.*, 174 Wn.2d 1 (No. 64736-9-1), 2011 WL 3694327.

> A parental rights termination case is a discrete proceeding focused exclusively on whether the legal right of a parent to the care, custody, and control of his or her child should be terminated. When the court reaches a decision on the merits of the termination petition, the termination proceeding is over.

Response Brief of DSHS at 28-29, *In re Dependency of M.S.R.*, 174

Wn.2d 1 (No. 64736-9-1).

SKP agrees with DSHS. While a termination is very serious, it is the dependency proceeding that initially transfers custody to the state and determines based upon a preponderance standard "the welfare of the child and his best interest." *Welfare of Becker*, 87 Wn.2d 470, 476, 553 P.2d 1339 (1976). Therefore, a dependency proceeding more directly implicates the child's physical and fundamental liberty interests.

c) Critical distinctions exist between dependency proceedings and termination of parental rights cases.

Even if the parties had not already conceded dependency proceedings differ from terminations, critical distinctions exist between a dependency proceeding and a termination of parental rights case. The dependency system in Washington State is a complicated civil process. It starts when DSHS receives a report that a child has been abused, neglected, or abandoned. RCW 13.34.010, *et seq.* DSHS assigns a social worker to investigate, and DSHS recommends whether the child should be physically removed from her parents and placed into state custody as a foster child. *Id.* DSHS files a dependency petition with the court alleging the "child's health, safety, and welfare will be seriously endangered if [he or she is] not taken into custody" and potential "imminent harm" to the child. RCW 13.34.050. If the child is removed from her family home, the

next step is the shelter care hearing where the court decides whether it is in the "best interests of the child" for her to go home or stay in state custody as a foster child. RCW 13.50.065. A parent can voluntarily agree to the dependency and for a variety of reasons many parents do so agree. RCW 13.34.100(3)(a). If not, the parent can contest the dependency, which results in a "fact-finding hearing" that resembles a trial to determine whether dependency is warranted. RCW 13.34.110. Although the ongoing dependency proceeding is adversarial, the court applies a "relatively lenient preponderance standard" to provide "necessary flexibility to the State." *In re Dependency of Schermer*, 161 Wn.2d 927, 942, 169 P.3d 452 (2007) (*citing In re Chubb,* 46 Wn. App. 530, 536-37, 731 P.2d 537 (1987)). If the court finds dependency, it enters a dispositional order that must *minimally* include a determination regarding: (a) placement of the child, including whether it is in a child's best interest to be placed with, have contact with, or have visits with siblings, (b) the school the child will attend, and (c) the specific "parental deficiencies" that resulted in removal with a plan for services tailored to correct the deficiency. RCW 13.34.130, .141, .025; *see also In re Dependency of A.M.M.*, 182 Wn. App. 776, 790, 332 P.3d 500 (2014) (due process is violated if a parent is held accountable for a parenting deficiency without notice).

Typically, the dependency proceeding revolves around evaluations to

determine the needs of the children, the parent's ability to meet those needs, and what services can be provided to assist the parent in meeting the needs of the children. The availability of, adequacy of, or the parent's response to services may drag out the dependency, trapping children in limbo without permanency. Sometimes (1) the parent fails to comply with services in a timely manner, and therefore the child cannot safely go home; (2) the severity of the parent's deficiencies requires years of treatment while the child waits to go home; or (3) the parent has periods of improvement followed by periods of regression; a horrible, heartbreaking cycle so child cannot safely go home. Jennifer K. Smith, *Putting Children Last: How Washington Has Failed to Protect the Dependent Child's Best Interest in Visitation*, 32 Seattle U. L. Rev. 769, 782-83 (2009).

A dependency proceeding continues, for months, years or even decades, with ongoing review hearings to review the status of the case and whether the needs of the children are being met, until either (a) reunification, (b) establishment of a guardianship, (c) the child is legally adopted, or (d) the child simply ages out of the system. RCW 13.34.136.

Hearing	**Statutory Deadline**	**Compliance**[17]
Fact-Finding to establish dependency	75 days after initiation	70% of cases statewide
First Review Hearing	6 months after initiation	85% of cases statewide
First Permanency Planning Hearing	12 months after initiation	84% of cases statewide

[17] Washington State Center for Court Research, *Dependent Children in Washington State: Case Timeliness and Outcomes 2014 Annual Report* 5 (2015), *available at* http://www.courts.wa.gov/wsccr/docs/DTR2014.pdf (last accessed 05/25/16).

Filing Termination of Parental Rights	15 months after initiation	62% of cases statewide (**median time is 29 months**)
Adoption	6 months after termination	44% of cases statewide

During the dependency review hearings, the court will make weighty decisions – not only trying to intuit what is in the child's "best interest" regarding her access to family members and education, but also about whether the child can participate in normal childhood experiences. Within a foster care system comprised of social workers, agency officials, service providers, and lay volunteers with no lasting, permanent connection to the children, the often changing faces of trial court is the ultimate arbitrator of such decisions as whether the child can go on vacation, attend fieldtrips, and whether to pay for school clubs, summer camp, or braces. In the dependency proceeding, the court will grant permission to DSHS to institutionalize the child or require the child to take psychotropic medications.[18] The child's failure to comply with court orders in the dependency proceeding may result in civil contempt. *In re Dependency of A.K.*, 162 Wn.2d 632, 174 P.3d 11 (2007) (discussing challenges presented by children running away from foster care and use of civil contempt by courts to punish foster children);[19] *cf. Tetro v. Tetro,* 86 Wn.2d 252, 255,

[18] The overmedication of foster children is well documented. F. Stambaugh, et. al., The overmedication of foster children is well documented. F. Stambaugh et. al., *Psychotropic Medication Use By Children In Child Welfare*, OPRE Report #2012-33, Washington, DC: Office of Planning, Research and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services 1 (2012), *available at* http://www.acf.hhs.gov/sites/default/files/opre/psych_med.pdf.

[19] Chief Justice Madsen highlights one potential value of attorneys for children. *Id.* at 654-656 (Madsen, J., concurring) (observing "[a]nother reason detention proves

544 P.2d 17 (1975) (due process requires appointment of counsel to parents in civil contempt proceedings for not paying child support).

Turning to the termination of parental rights, co-extensive with the dependency proceeding, DSHS files a petition seeking termination under a new cause number. RCW 13.34.136. Assuming the termination goes to trial, DSHS must prove the parent is unfit such that the legal right of a parent to the care, custody, and control of her child should be terminated. RCW 13.34.180. Unlike the dependency proceeding, the focus is discrete, focused exclusively on parental fitness, and the standard is clear, cogent and convincing evidence. *In re Welfare of A.B.*, 168 Wn.2d 908, 920, 232 P.3d 1104 (2010), *as amended* (Sept. 16, 2010). The dependency proceeding continues—no matter the outcome.[20]

2. A constitutional analysis must consider the *physical* liberty interest implicated in the dependency context.

A constitutional analysis in this case must consider the threat to children's *physical* liberty interests in the dependency context. The U.S. Supreme Court declared there is a presumption against counsel unless physical liberty is at stake. *Lassiter,* 452 U.S. at 26-27; *see also, e.g., In re Lain*, 179 Wn.2d 1, 14-16, 315 P.3d 455 (2013) ("Liberty from bodily

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ineffective as a deterrent to runaway behavior is that children in foster care often run because of their desire to connect with family, friends, and familiar surroundings.").

[20] Even if the termination of parental rights case is to find the parent "fit" to care for the needs of the children, the dependency proceeding is maintained *at least* another six months for DSHS supervision. RCW 13.34.138(2)(a).

restraint is at the core of the due process clause, and although [prisoner's] interest prior to actual release is more minimal than that of a parolee, the nature of the interest is substantially similar."). Stating the *Lassiter* holding in the positive, when physical liberty is at stake, a presumption should arise for counsel. *Lassiter,* at 18. In *Lassiter,* no presumption was found because a parent does not lose his or her physical liberty when parental rights are terminated. Here, SKP is the child and her physical liberty interests are at stake if she is made a dependent of the state; therefore, a higher level of protection is required.

Juvenile dependency law is often viewed as a struggle between the rights of the parents and the *parens patriae* power of the state to intervene with the parent-child relationship in cases of abuse and neglect; however, there is a third party: the child, who has constitutionally protected liberty interests within the dependency context. *Tamas v. Dep't. of Soc. & Health Servs.,* 630 F.3d 833, 846 (9th Cir. 2010) (citing authority for children's liberty interests in their own care from Second, Eleventh, Sixth, Seventh, Tenth, Eighth and Third Circuits); *Taylor ex rel. Walker v. Ledbetter,* 818 F.2d 791, 797 (11th Cir.1987) (en banc) ("[A] child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a § 1983 action for violation of fourteenth amendment

rights.");[21] *Braam*, 150 Wn.2d 689. The unique relationship created when the child is *physically* removed and placed into state custody triggers due process protections. Children in dependencies have due process rights under the federal constitution because the state has exercised its awesome authority to intervene in their lives with absolute and total control over their *physical* placement.

Our Supreme Court has already recognized the child has a physical liberty interest at stake in these proceedings: "It is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another." *MSR,* 174 Wn.2d at 16.

The only federal court to recently consider the issue held that abuse and neglect proceedings pose a real threat to physical liberty:

> [E]vidence shows that foster children in state custody are subject to placement in a wide array of different types of foster care placements, including institutional facilities where their physical liberty is greatly restricted. Indeed, plaintiffs have pointed to evidence that foster children are often forced to live in such institutional settings because suitable family foster homes are not available.

Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353, 1360-61 (N.D). In

[21] The *Taylor* Court explained: "In the foster home setting, recent events lead us to believe that the risk of harm to children is high. We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the fourteenth amendment. Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents." 818 F.2d at 797.

Kenny A., children in foster care sued Georgia for various failures within its foster care system. *Id.* One failure was inadequate counsel for children in dependency proceedings. *Id.* On a motion for summary judgement, Georgia argued state law afforded children a right to counsel solely in termination cases. The *Kenny A.* court soundly rejected this argument, holding children were entitled to appointment of counsel in both dependencies and terminations on constitutional grounds. *Id.*

There can be no doubt: when children are removed and brought into state custody, their physical liberty interests are at stake. When the U.S. Supreme Court in *Lassiter* decided to apply *Mathews*, the Court added the presumption that finding an absolute right to appointment of counsel turns upon physical liberty interests. *Lassiter*, 452 U.S. at 42, n.8 (Blackmun, J., dissenting) ("By emphasizing the value of physical liberty to the exclusion of all other fundamental interests, the Court today grants an unnecessary and burdensome new layer of analysis onto its traditional three-factor balancing test."); Kevin W. Shaughnessy, *Lassiter v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants*, 32 Cath. U.L. Rev. 261, 284 (1982) (explaining how inclusion of the physical liberty presumption tipped the scales in the state's favor). Because children's physical liberty interests are implicated in dependency proceedings, this Court should hold for an absolute right to appointment of

counsel under the federal constitution. Or, at minimum, this Court should hold the physical liberty presumption created in *Lassiter* shifts the burden to DSHS to rebut the necessity of appointment. It contradicts *Lassiter* (and is simply unfair) to force children to carry the burden of what was hailed as a "rebuttable presumption." *Lassiter*, 452 U.S. at 27.

3. Applying the *Mathews* factors, a blanket rule mandating appointment of counsel is required.

In *MSR,* our Supreme Court left the decision to appoint counsel for children in termination of parental rights cases to the court on a case-by-case basis under a *Mathews* analysis, subject to appellate review. 174 Wn.2d 1. The presumption that the right to counsel attaches where physical liberty is at stake means a *Mathews* analysis is not required in the dependency context. If this Court finds children's physical liberty interests are implicated in dependency proceedings, then everything stops because children have the right to be represented by an attorney. However, if this Court finds children's physical liberty interests are *not* implicated in dependency proceedings, then this Court should apply *Mathews* to dependency proceedings *contextually* rather than *individually*. *See Lassiter*, 452 U.S. at 49 (Blackmun, J., dissenting). As Justice Blackmun predicted, a case-by-case approach creates an impossible standard. *Id.* Even worse, the case-by-case approach based on the individual character

of the litigants and the proceeding implicitly requires children to compare themselves to each other to prove they are "extremely" more traumatized to justify appointment of counsel; such a requirement, no matter how well-intentioned, diminishes the real struggles and humanity of each child.

a) Justice by geography: status of right to counsel in Washington counties

The opposite of predictability and uniformity in administering justice is unpredictability and inconsistency. Both adjectives describe the status of the right to counsel in dependency proceedings in Washington, which turns largely on where the child lives.[22] The Children's Representation Project, within the Office of Civil Legal Aid, contracts with attorneys for children in foster care six months after termination of parental rights. RCW 13.34.100 (6). The counties pay the costs of these attorneys and receive reimbursement through the state. *Id.* Where an attorney is appointed prior to termination of parental rights, the county pays for the attorney. Some counties, including King, appoint attorneys for all children starting at age 12. King Co. LJuCR 2.4(a). Benton/Franklin County appoints attorneys for all children starting at age eight. Benton Co. LJuCR

[22] In addition to geography, race may also play a significant factor. No empirical study has been undertaken on this point, but this Court may take notice of the well-documented, significant racial differences in length of dependency, especially for longer dependencies, and in the degree of compliance with court processing guidelines. David B. Marshall, TECHNICAL REPORT: Permanency Court Processes and Outcomes for Children in Out of Home Care (Dec. 2013), *available at*: http://www.courts.wa.gov/wsccr/docs/TECHNICAL_REPORT_PermanencyCourtProcesses OutcomesForChildrenInOutOfHomeCare.pdf

Rule 9.2(A)(1). Other counties never automatically appoint attorneys. This system allows for a child in one county to enjoy the right to be represented by counsel, while another child in a neighboring county does not.

b) As a practical matter, Mathews is unworkable in dependency proceedings.

Attempting to apply *Mathews* individually through a case-by-case approach is unworkable. As Justice Blackmun predicted in his dissent in *Lassiter,* "the case-by case approach entails serious dangers for the interests at stake and the general administration of justice." *Lassiter,* 452 U.S. at 50 (Blackmun, J. dissenting). *See also In re T.M.,* 131 Hawai'i at 433 ("The foregoing review of the instant case reveals the inadequacy of an approach that allows the appointment of counsel to be determined on a case-by-case basis once DHS moves to assert foster custody over a child."); *In re K.L.J.,* 813 P.2d at 282 n.6 (rejecting case by case approach in parental terminations); *Corra v. Coll,* 451 A.2d 480, 482-83 (Pa. Super. Ct. 1982) (accord). Our Supreme Court has also recognized the inherent dangers in the case-by-case approach, embracing the adoption of a blanket rules in many contexts, including parent's right to counsel.

The case-by-case approach overly burdens child litigants. First, in *King*, our Supreme Court refused to order a case-by-case approach in family law actions, observing that "[the] approach would be unwieldy,

time-consuming, and costly. The proceeding itself might require the appointment of counsel..." 162 Wn.2d at 390 n.11. The very same occurred here, where SKP obtained an attorney to ask for an attorney, initiating a complicated legal process that included an intervening court, at least one lengthy continuance, and a transfer of jurisdiction to the presiding court judge on just appointment alone, only to be denied an attorney for lack of "extreme" circumstances. Second, as a constitutional right, the right to counsel *should not depend on the child* raising it. *State v. Stone*, 165 Wn. App. 796, 815, 268 P.3d 226 (2012) ("The right to counsel does not depend upon a request by the defendant, and this court may not presume waiver of counsel from a silent record." (citing *Carnley v. Cochran*, 369 U.S. 506, 513, 516, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962))). It is no protection to say the child can ask for or even hire an attorney when our courts have already held children cannot protect their own legal rights. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998) (By law, children lack capacity and "the experience, judgment, knowledge and resources to effectively assert their rights."). Third, a case-by-case approach compels a child to remain at the mercy of adults to assert her constitutional rights. These adults are her technical, and sometimes real, adversaries in the proceeding. *See The Illusion of Due Process for Children in Dependency Proceedings*, *supra*, at 190

(observing that a dependency proceeding, like every other legal proceeding, is inherently adversarial because conflicts arise between the rights of the child and the parent or custodian, or the rights of the child and the powers of the state).

The case-by-case approach overly burdens the trial court. First, the case-by-case approach requires the court to determine *in advance* the need for counsel by predicting accurately what facts will be disputed, the character of cross-examination or the testimony of various witnesses and how these conflicts will advance or hinder the child's goals and then apply a fresh constitutional analysis in every case. *See, e.g.*, *K.L.J.*, 813 at 282, n.6. *See also* John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L. Rev. 763 (2013) (difficulty judges face in accurately determining in advance whether a case is sufficiently complex to merit counsel). Second, the court may not advise the pro se litigant and neither can the court direct the other parties' attorneys to consult with the child. Consider if a child has a question about the proceeding[23] and asks the Assistant Attorney General, the Rules of Professional Conduct dictate the

[23] Here, SKP never had an attorney to answer her basic questions like: "Can I go home?" "When can I go home?" and "What kind of help do I need to deal with what is going on in my life?" SKP had no one with whom she could confidentially discuss her options, consequences of her statements to the other parties, the meaning of the court orders, and no one to represent her legal interests.

attorney cannot answer except to advise the child to secure the services of an attorney. RPC 4.3. Each attorney in the dependency proceeding owes a duty to his or her own client, not the child. Third, due process is important not only to enhance the accuracy of the decision, it is about treating individuals fairly and with dignity when important decisions are made about their lives. The deprivation of counsel undermines the legitimacy of the court as the child's confidence in the fairness of the ongoing proceeding turns on her belief the court listened to her.[24]

The case-by-case approach overly burdens appellate courts. First, it is impossible to prove an attorney could have made a determinative difference after the fact without a record created by an attorney. *Lassiter*, 452 U.S. at 51 (Blackmun, J. dissenting). Therefore, the transcript alone will not be dispositive of whether an unrepresented child was disadvantaged because it will not show access to discovery, witnesses, issue-spotting, or the other legal resources necessary to achieve the child's stated interests and goals. The reviewing court must expand its analysis into a time-consuming investigation of the entire proceeding to find

[24] Office of the Family & Children's Ombudsman, *Foster Care, What Young People Say is Working* 3, 16 (January 2001) (Through an appreciative inquiry approach to analyzing foster care, the study found that "(y)oung people said that success in foster care occurs when they feel like adults listen to and respect their opinions They describe success primarily in terms of feeling that they are able to influence what is happening to them."); Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in A Children's Law Clinic*, 17 St. Thomas L. Rev. 623, 657 (2005) (explaining how the courts perpetuate fatalism and insecurity experienced by foster youth by excluding them from the process).

potential errors or opportunities for the child to have impacted the outcome. *Id.* The reviewing court must also attempt to intuit the myriad concerns of the child within the proceeding. *Id.* Second, it is possible, even likely, that no appellate court will ever accept review to undertake this messy, friction-generating factual inquiry into the dependency. RAP 2.3(b). Ten years after our Supreme Court first acknowledged this problem, *In re Parentage of L.B.*, 155 Wn.2d at 712, trial courts still have no appellate guidance and no case has been published since *MSR,* which was expressly limited to terminations. Appellate review cannot be counted on to mitigate the dangers of the case-by-case approach.

The case-by-case approach results in irreversible harm. Irreversible harm is experienced by the child waiting for an attorney. *T.M.*, 131 Haw. at 436 ("[R]eal human costs are sustained by all of the parties when, as in the instant case, the court's failure to appoint counsel results in a remand for further proceedings."). As compared to similar children, children who age-out of foster care have poorer outcomes in health, well-being, and life, as they are more likely to not obtain a high school diploma or GED; to not gain employment; to earn much lower annual income; to sustain lower economic security; to suffer from higher rates of physical health problems, mental illness, substance abuse, and behavioral problems; to experience greater rates of incarceration and criminal victimizations; to engage in

unprotected sex, with a much earlier parenthood and with much more child welfare involvement; and to feel hopeless about their futures. *See, generally,* M.E. Courtney, et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Ages 23-24* (2011).[25] Surely once the child's physical and fundamental liberty interests are in jeopardy, the need for counsel reaches a zenith. Children should have a right to counsel to protect them from harm before it occurs, not reactively to mitigate the injury later—especially in the face of the well-documented negative outcomes for children subject to dependency proceedings.

c) A reflective Mathews analysis demonstrates counsel is always appropriate in the dependency context.

In his *Lassiter* dissent, Justice Blackmun asserted the flexibility of due process requires a "case-by-case consideration of different decision-making *contexts*, not of different *litigants* within a given context." 452 U.S. at 49 (emphasis in original). All children in dependencies are similarly situated in a larger sense, confronting allegations of abuse and neglect by their parents in an adversarial proceeding that implicates every one of their constitutionally protected liberty interests. Applying *Mathews* to the dependency context shows the decision to appoint counsel is always appropriate given a child's profound investment in the accuracy and

[25] *Available at* http://fosteringmediaconnections.org/wp-content/uploads/2010/08/MW-Wave-4-full-reportl .pdf.

justice of the court's decisions encompassing, to quote DSHS, "all matters associated with the child's care and well-being." Moreover, parents cannot adequately mitigate the risk of harm[26] to the child in the dependency proceeding, which they cannot control. *See also, Kenny A.,* 356 F. Supp. 2d at 1359 (the very nature of the proceedings, which allege the parent's unfitness to care for their children, suggests an "inherent conflict of interests" between parents and children). For obvious reasons, the state cannot either. *Braam,* 150 Wn.2d 689; *Tamas*, 630 F.3d 833 (lawsuit against DSHS for harm caused by years of sexual abuse by foster parent). Even if a GAL is appointed,[27] a GAL cannot protect the legal rights of the child. Laws of 2010, ch. 180, § 1 (findings noting attorneys "have different skills and obligations than [GALs]"). Finally, given its *parens patriae* function, the state must do all it can to avoid an unfair, mistaken, or arbitrary decision, including the appointment of counsel in the dependency proceeding.[28] While costs are a legitimate concern, *Lassiter,* 452 U.S. at 28, Pierce County spent an average of $37,000 to pay

[26] "'Harm' is to be given its ordinary meaning of physical or mental damage." *Braam,* 150 Wn.2d at 699-700.

[27] Volunteer guardian ad litem programs do not operate in every county and within those programs, appointment is spotty. For example, King County Dependency CASA reports only 60 percent of the youth they are supposed to serve receive a CASA guardian ad litem (http://www.kingcounty.gov/courts/JuvenileCourt/depcasa.aspx)

[28] The existence of a child's attorney in a dependency has the added benefit of being shown to substantially expedite permanency. Zinn, A. E. & Slowriver, J. *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County.* Chicago, IL: Chapin Hall Center for Children (2008).

attorneys for 139 children between 2012 and 2014, CP 233, while discovery requested by SKP reveals the County projects to spend $359,660 on office supplies in 2015, CP 260.

VII. CONCLUSION

Continuity of relationships, surroundings, and environmental influences are essential for a child's normal development, but they do not play the same role in later life so their importance is often underrated by the adult world. J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* (1973). This tragic pattern of misunderstanding leads to routine denial of basic attention to the foster child's needs for physical care, nourishment, comfort, affection and stimulation. Children are placed into the foster care system because of society's concern for their well-being. We recognize these children are at great risk in or out of foster care. But at least while in state custody, these children deserve the maximum protection our legal system can offer: representation by an attorney.

Respectfully submitted this 1st day of June, 2016.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re the Dependency of S.K.P., Minor Child,	)	Case No. 48299-1-II
Appellant.	)	CERTIFICATE OF SERVICE

Annabell Joya declares under penalty of perjury that the foregoing is true and correct under the laws of the State of Washington. I am a legal assistant at Columbia Legal Services. I served via e-mail the following:

- Appellant's Notice of Errata

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Dated this 10th day of June, 2016.

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